IN THE

Supreme Court of the United States

October Term, 1943.

No. 31.

McLEAN TRUCKING COMPANY, INC., THE SECRETARY OF AGRICULTURE OF THE UNITED STATES, and AMERICAN FARM BUREAU FEDERATION, *Appellants*,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ASSOCIATED TRANSPORT, INC., BARNWELL BROTHERS, INC., *et als.*, *Appellees*.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEES, ASSOCIATED TRANSPORT, INC., BARNWELL BROTHERS, INCORPORATED, CONSOLIDATED MOTOR LINES, INCORPORATED, HORTON MOTOR LINES, INCORPORATED, McCARTHY FREIGHT SYSTEM, INC., M. MORAN TRANSPORTATION LINES, INC., SOUTHEASTERN MOTOR LINES, INCORPORATED, TRANSPORTATION, INCORPORATED, BARNWELL WAREHOUSE & BROKERAGE COMPANY, BROWN EQUIPMENT & MANUFACTURING COMPANY, CONGER REALTY COMPANY, and SOUTHERN NEW ENGLAND TERMINALS, INC.

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Dated: October, 1943.

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INDEX.

CITATIONS.

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Report of Opinion of the Court Below.

The opinion of the District Court, specially constituted according to Statute (R. 82-87), is set forth in 48 F. Supp.

933. Report of the Interstate Commerce Commission is found in 38 M. C. C. 137.

Jurisdiction.

Appellants claim jurisdiction by this Court by virtue of Section 210 of the Judicial Code, as amended, 36 Stat. 1150, 38 Stat. 220 (Urgent Deficiencies Act of October 22, 1913), (28 U. S. C. 47a), and Section 238 of the Judicial Code as amended, 43 Stat. 938 (28 U. S. C. 345).

Questions Presented.

The gravamen of this appeal is whether or not an order of the Interstate Commerce Commission, entered on March 16, 1942, as amended by its order entered June 8, 1942, in a proceeding approving the merger of certain common carriers by motor vehicle, constituting some of the above named appellees, applied the standards required by, and was otherwise in accordance with, Section 5 of the Interstate Commerce Act.

Statutes Involved.

The statutes involved are Section 5 of the Interstate Commerce Act, as amended by the Transportation Act of September 18, 1940, 54 Stat. 898, 905-910 (49 U. S. C. 5); and the National Transportation Policy set forth in the said Act, 54 Stat. 899.

Statement of the Case.

This action was brought by the plaintiff appellant, McLean Trucking Company, Inc., a common carrier by motor vehicle within part of the territory in which some of the defendant motor carriers operate, against the United States of America and the Interstate Commerce Commis-

sion, Associated Transport, Inc., Arrow Carrier Corporation, Barnwell Brothers Incorporated, Consolidated Motor Lines Incorporated, Horton Motor Lines Incorporated, McCarthy Freight System, Inc., M. Moran Transportation Lines, Inc., Southeastern Motor Lines Incorporated, Transportation Incorporated, The Transport Company, Kuhn Loeb & Company, Barnwell Warehouse & Brokerage Company, Brown Equipment & Manufacturing Company, Conger Realty Company, and Southern New England Terminals, Inc., under the Urgent Deficiencies Act (38 Stat. 429, 219; 28 U. S. C. A. Secs. 45 and 47a) to enjoin and set aside an order of the Interstate Commerce Commission which authorized the merger of the defendants, who are carriers by motor vehicle, and the issuance of securities in connection therewith. It was heard by a court of three judges, pursuant to the Statute.

The proceedings before the Commission were instituted by Associated Transport, Inc., a Delaware corporation which was organized for the purpose of bringing about the proposed merger and which was not then engaged in the transportation business. The carriers by motor vehicle it was proposed to merge operated as common carriers on regular routes and one or more of them served communities in Massachusetts, Rhode Island, Connecticut, New York, Pennsylvania, Ohio, New Jersey, Delaware, Maryland, the District of Columbia, Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Tennessee, and Louisiana.

There were two petitions which were consolidated for hearing (R. 9-10). The first was by Associated Transport, Inc., for authority under Section 5 of the Interstate Commerce Act (1) to obtain control through the purchase of their capital stock of the following eight common carriers by motor vehicle: Arrow Carrier Corporation, Pat-

erson, N. J.; Barnwell Brothers Incorporated, Burlington, N. C.; Consolidated Motor Lines Incorporated, Hartford, Conn.; Horton Motor Lines Incorporated, Charlotte, N. C.; McCarthy Freight System, Inc., Taunton, Mass.; M. Moran Transportation Lines, Inc., Buffalo, N. Y.; Southeastern Motor Lines Incorporated, Bristol, Va.; and Transportation Incorporated, Atlanta, Ga.; and (2) to consolidate into a unit for operation by itself the properties and rights to operate of the named carriers within one year from the date it should acquire the control of them. The second application was for authority to issue preferred and common stock to obtain funds needed to acquire the control of the named carriers and four associated non-carriers, viz., Barnwell Warehouse & Brokerage Company, Burlington, N. C.; Brown Equipment & Manufacturing Company, Charlotte, N. C.; Conger Realty Company, Charlotte, N. C.; and Southern New England Terminals, Inc., Taunton, Mass.

The Antitrust Division of the Department of Justice, the Secretary of Agriculture, four fruit growers associations and Super Service Freight Company, a common carrier by motor vehicle, intervened and opposed the applications. There were other intervenors who, however, stood indifferent except the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America which at the close of the hearings supported the applications.

In the instant proceedings there were extensive hearings before an Examiner, at which a large amount of evidence was introduced. After his proposed report was duly served on the parties, the intervenors who opposed the applications filed objections which were argued before the Commission which, after due consideration, made the order now under attack.

The Commission made findings on that the proposed consolidation would bring about economies and greater efficiency in operation; improvement in service; leave ample competitive motor vehicle carrier service in the territory affected; and be in the public interest within Section 5 of the Interstate Commerce Act.

After the suit was brought and the answer of the Commission was filed, it was amended to allege, what is now undisputed, that because of the failure to carry through negotiations for the acquisition of the stock of the Arrow Carrier Corporation, the applicant petitioned the Commission for a modification of its order to exclude that carrier from the merger authorized, and that was done by order entered June 8, 1942. All phases of this controversy which resulted from the inclusion of Arrow in the authorized consolidation are, therefore, eliminated.[1]

[1] Arrow Carrier Corporation, a common carrier operating principally in the State of Pennsylvania, was included in the application to the Interstate Commerce Commission. Its stock was and had been for nearly a year under option to Kuhn, Loeb & Co., investment bankers, New York City. It had not originally been included in the merger but was added a few days before the application was filed with the Interstate Commerce Commission to fill a gap in the proposed integrated service. The aforesaid option expired December, 1941, and the owners of the Arrow Company refused its renewal. The Commission was at all times apprised that any contract right to its inclusion was predicated upon the approval of the merger by the Commission before the option expired, and after that time upon the ability of Kuhn, Loeb and Arrow Carrier stockholders to get together on a price. The Commission's order of March 16, 1942 contemplated Kuhn, Loeb's inability to complete its contract to deliver Arrow Carrier stock to Associated. Upon the Commission's approval of the merger, Kuhn, Loeb was unable to perform; and Associated Transport, Inc., being desirous of simplifying this litigation, and for other proper purposes to conform its acquired authority to the existing facts, by petition dated May 22, 1942 sought an amendment to the Commission's order of March 16, 1942 eliminating the Arrow Carrier transaction and the accompanying stock authorization from the order and its books. Such amendment was granted (R. 71). As shown in the petition (R. 67-69), which is an exhibit certified to the Court by the Commission in this case, J. S. Arnold, who had represented Kuhn, Loeb on Associated's Board of Directors, had resigned from the Board of Directors of Associated Transport.

The United States answered by confessing error and praying for a decree setting aside the Commission's order. The other defendants answered joining issue and praying that the complaint be dismissed. Their right so to do was not affected by the confession of error by the United States, and the issues thus raised are still open. 28 U. S. C. A. Sec. 45 (a); *Interstate Commerce Commission vs. Oregon-Washington R. R. Co.*; 288 U. S. 14. The District Court dismissed the complaint the 28th day of December, 1942 (R. 89).

Specification of Errors Urged by Appellants.

Appellants urge that the Court below erred in that it did not set aside the order of the Interstate Commerce Commission on the grounds:

A. That the Commission's order was erroneous because it made its determination by the standard of what it determined was adequate transportation facilities in the public interest under the criteria prescribed in the Interstate Commerce Act without deciding that its order would not result in a consolidation that would violate the provisions of either the Sherman or the Clayton Acts.

B. That the Commission erred in failing to make findings that the consolidation would be consistent with the Sherman and Clayton Acts as those Acts have been construed generally.

C. That the Commission erred in making a decision which it is claimed is not in accordance with the National Transportation Policy as stated in the Transportation Act of 1940, and otherwise not in accordance with said Act.

D. That the Court below erred in deciding that the elimination of Arrow Carrier Corporation from the merger in the Commission's amended decision giving effect

to the same removed questions respecting Arrow Carrier Corporation.

E. That the Court below erred in determining that the Commission's findings of fact were supported by evidence, and the Commission's decision was otherwise in accordance with the applicable law and was valid.

Summary of Argument.

I.

The Commission's order authorizing this merger applied the standards and contained the findings required by law and was in accordance and consistent with the standards and criteria prescribed by the Transportation Act of 1940 with respect to motor carriers. This is confirmed by the wording of this Law and the legislative history of the same.

II.

The Commission's findings of fact are amply supported by the evidence before it.

ARGUMENT.

I.

The commission's order authorizing this merger applied the standards and contained the findings required by law.

Among the earliest attempts to regulate transportation for the public weal were the passage of laws directed specifically at preventing monopoly and the restriction of competition in this field [1A]. Three years later these laws were followed by the Sherman Act[2] which went beyond

[1A] Interstate Commerce Act, 1887, Section 5, 24 Stat. 380.
[2] Sherman Act, 1890, 26 Stat. 209.

the field of transportation and was applicable to all businesses. This latter statute, was amplified by its companion, the Clayton Act and the two as amended, are commonly called the Antitrust Acts and depend upon their penal nature to bring about the conduct of business for the public good. Until the passage of the Transportation Act of 1920,[2A] they were applied and enforced impartially in the field of transportation and the field of general business.

With the adoption of the Transportation Act of 1920, there was made a new approach to the field of transportation regulation. The effect which Congress has heretofore directed to the passage of restrictive measures calculated only to suppress and minimize demonstrated harmful practices was turned to new channels. Now a position of positive public responsibility towards the fostering and maintenance of an improved transportation service was unmistakably indicated. Regulation for the first time clearly charged the Interstate Commerce Commission with constructive functions[3].

During the war period and when the railroads were under Federal control, valuable experience had been gained in the unified operation of the lines. As a result of this experience and in keeping with the more progressive method of attacking transportation problems, there was a "sharp modification in the Transportation Act of 1920 of the traditional emphasis upon enforced competition.[4] The rigid prohibitions of the antipooling clause of the former Act to Regulate Commerce, and which prohibitions were the ancestors and genesis of the Antitrust Laws, were modified and relaxed. Congress, however, went much further and enacted Section 5 (8) by which the carriers, having

[2A] 41 Stat. 456.

[3] Edgar J. Rich, The Transportation Act of 1920, "American Economic Review," Vol. 10, pp. 507-521.

[4] Sharfman, "The Interstate Commerce Commission," Vol. 1, p. 183.

secured the Commission approval to combinations or cooperative arrangements, were specifically relieved from the operation of the Antitrust Laws as well as all other restrictions of state and federal statutes to any extent necessary to effectuate such approved combinations or arrangements[3]. In the 1920 Act, no express limitations were imposed upon the Commission's exercise of its discretion insofar as granting authority for the acquisition of stock was concerned. A blanket finding of "public interest" was all that was prescribed for Commission guidance[4]. Respecting mergers, provision was made that approval be conditioned upon their coming within a blueprint of a national plan for coordinated service which the Commission was charged with developing. For many reasons, including the tremendous nature of the task, the time element entering therein and during which rail relationships could not remain static in the face of changing transportation needs and conditions, and the existence of other avenues under the Law which permitted such changes in relationship, the blueprint was not produced until 1929[5] and was never put into effect. Indeed at various times the Commission indicated its desire to be relieved of the necessity for formulating such a plan[6].

By 1933 the economic condition of the rails had become such that Congress passed the Emergency Transportation Act of that year[7]. The "recapture clause" was repealed

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[3] *United States vs. Southern Pacific Co.*, 290 Fed. 443 (1923). *Control of D. S. & S. R. R. by Lehigh Valley R. R.*, 86 I. C. C. 367 (1924). *U. S. v. Lehigh Valley R. R. Co.*, 254 U. S. 255 (1920).

[4] Sharfman, "The Interstate Commerce Commission", Vol. 2-A, pp. 430-431. *New York Central Securities Co. vs. United States*, 287 U. S. 12 (1932).

[5] 159 I. C. C. 522; 185 I. C. C. 403.

[6] For example see Letter of Interstate Commerce Commission to Chairman of Interstate Commerce Committee of Senate, Feb. 4, 1925, reading in part: "that results as good or perhaps better are likely to be accomplished with less loss of time if process of consolidation is permitted to level off under guidance of the Commission in a more normal way".

[7] 48 Stat. 220.

retroactively and the provisions for acquisitions and combinations were combined and both made subject to the requirement of a Commission finding that such transactions would "promote the public interest" and be in accordance with the consolidation plan. The enactment of this legislation in 1933 indicated no change in Congressional policy[10]. By the same Act of 1933, provision was made for a Federal Coordinator.

During the late nineteen-twenties and prior to the passage of the Emergency Transportation Act, motor freight and bus transportation had assumed proportions of national importance. No less than 34 bills had been introduced in Congress to regulate such transportation. The decisions of this Court in *Buck vs. Kuykendall*, 267 U. S. 307; and *Bush Co. vs. Maloy*, 267 U. S. 317, had helped crystalize sentiment for regulation among the states[11]. The dangers of unrestrained and oversupplied competition in the motor field recalled the early days of the railroads[12]. The problem was examined by the Commission and the Federal Coordinator[13], and a bill to amend the Interstate Commerce Act to include the regulation of trucks and busses became law in 1935[14].

The very essence and nature of the Motor Carrier Act of 1935, with its "grandfather clause" freezing operating

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[10] *Texas vs. United States*, 292 U. S. 522.

[11] Proceedings of National Association of Railroad & Utility Commissioners, 1925 through 1934 inclusive.

[12] State Regulation of Interstate Commerce Carriers, "Michigan Law Review", Vol. 31, pp. 920-952, 1097-1111. "The present demoralization of interstate commerce transportation, due to unsound competitive practices, and the menace of such unrestricted competition to the integrity of the national transportation system as a whole create problems that call imperatively for federal legislation."

[13] Motor Bus and Motor Truck Operation, 140 I. C. C. 685 (1928); Coordination of Motor Transportation, 182 I. C. C. 263 (1932); Sen. Doc. No. 43, 72d Cong., 1st Sess.; Regulation of Transportation Agencies, 73d Cong., 2nd Sess.; Sen. Doc. No. 152 (1934); Transportation Legislation, 74th Cong., 1st Sess.; House Doc. No. 89 (1935).

[14] 49 Stat. 543.

rights as of a date prior to the passage of the Law, was both a restriction and a limitation on competition. It could be nothing else, and that it contained a safety valve against undersupply of competition in the provisions of Section 206 relating to the granting of new certificates is no indication to the contrary. Much of the impetus for the passage of the Law came from the Federal Coordinator's testimony and reports to the Senate:

> "The most important thing, I think, is the prevention of an oversupply of transportation; in other words, an oversupply which will sap and weaken the transportation system rather than strengthen it.[15]
>
> "The public interest in transportation may, then, be summarized as requiring at least the following: (1) The minimum of outright duplication of facilities or services; (2) A transportation system which is well organized and functions in an orderly, dependable way, other than one which is unstable, uncertain and a breeder of discriminations; (3) Responsibility in both the narrow and broad sense indicated above; and (4) Financial stability and good credit.
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> "Both (contract and common carrier by truck), but especially the common carrier, are continually faced with actual or potential competition from private truck operation, whether it be by industries, commercial or shipper organizations, or farmers."[15A]

The unification provisions of the 1935 Act were contained in Section 213 thereof, and this Section was, except for the provisions respecting the plan for railroad consolidation and certain other parts which were clearly inapplicable, lifted almost bodily and verbatim from the Transportation Act of 1920, *as amended*, (including the amendments contained in the Emergency Transportation

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[15] Testimony of Joseph Eastman, Chairman of Interstate Commerce Commission and Federal Coordinator of Transportation, before the U. S. Senate on bills to amend the Interstate Commerce Act; 74th Cong., 1st. Sess., Part I, p. 78.

[15A] Report of Federal Coordinator of Transportation, Sen. Doc. No. 152, 73d Cong., 2nd Sess.

Act of 1933). One significant change, clearly indicative of the Congressional intent to smooth the path and encourage the road to integrations and mergers, must be noted. Whereas in the Railroad Act of 1933 the criteria and requirement which the Commission was to apply in approving mergers was that they should "*promote the public interest*", Congress, in adapting this legislation for motor carriers, made the test far easier to meet and specified that the requirement and criteria for approval of mergers solely between motor carriers was simply that the Commission should find the proposed merger would be "*consistent with the public interest*".

Nor can any argument of substance be made that the Congressional choice of such language was without design and deliberation for, having chosen such test for motor carriers, it added a proviso that if any carrier other than a motor carrier were involved, the requirement and criteria for approval must be that the public interest will be *promoted* by such carrier being thus enabled to use the service by motor vehicle to public advantage and that the transaction *will not unduly restrain competition*[16].

As a further indication of the understanding of Congress of the transportation problems involved at the time of the passage of this Law, we may note the explanation of Senator Wheeler, spokesman for the Committee on Interstate Commerce, of the purpose of including consolidation provisions[17] in the law. The Senator asserted that while most truck operators were small, there were rumors of expansions into large systems. He said that in view of the history of railroad and public utility unifications prior to regulation of those enterprises, it was desirable to exercise control over such developments where they were of such size as to make the matter territorially important.

[16] Transportation Act of 1940, Section 5 (2) (b).

[17] Congressional Record (74th Cong., 1st Sess., Vol. 79, pp. 5654-5).

Senator Wheeler also discussed the restrictions on rail-truck mergers, including the requirement that they must not unduly restrain competition. He said, "With this limitation, it will be permissible for the Commission to allow acquisitions which will make for a coordinated or economical service and at the same time protect the public against monopolization of highway carriage by rail, express or other interests."[18]

These statements were repeated in substance to the House of Representatives by Representative Sadowski.[19]

It would seem that the wisdom of having the Interstate Commerce Commission assume such control was uncontested in Congress, which gave its attention to providing machinery for accomplishing this purpose. Any argument that the primary concern of Congress was the preservation of the spirit, letter or machinery of the Antitrust Laws, or that the development of the Industry was to be or could be promoted or controlled within the framework or criteria of such Laws, is completely answered by the language of Section 213 and the placing of the control of such unifications in the hands of the Commission where it was obvious transportation criteria, as defined by the settled law[20], would be applied. Such action was wholly consistent with the disposition which it made of the rails, problems in the same law and in accordance with the repeated suggestions and requests of the Commission. Had Congress intended that regulation on the growth of the Industry should be undertaken by the Antitrust Division or that the application of the Antitrust Laws and their

[18] Congressional Record (74th Cong., 1st Sess., Vol. 79, pp. 5654-5).

[19] Congressional Record (74th Cong., 1st. Sess., Vol. 79, p. 12206).

[20] Transportation criteria have been held to include considerations of adequate, economical efficient, necessary and appropriate transportation service in which facilities are put to the best use. *N. Y. Securities Corp. vs. U. S.*, 287 U. S. 12.

criteria would accomplish the public purpose of providing a proper transportation system, there would have been no necessity for the passage of Section 213 or Senator Wheeler's remarks on that subject, since in the absence of such provisions the Antitrust Laws would have been fully applicable[20A]. The statements of the Senator indicate plainly Congressional knowledge of the contemplation of sizable mergers of motor truck lines and the Congressional intent to control, through the Interstate Commerce Commission, but not to hinder such natural development.

Turning to the Transportation Act of 1940, which Act covers the instant case, it is not only self-evident but appellants concede and assert that the provisions of the unification section thereof (Section 5) are nothing more or less than the language of Section 213 of the Motor Carrier Act of 1935 with such minor adaptations as were necessary to relate its provisions to all types of carriers[21].

But it is equally self-evident, as we have previously seen, that the language of Section 213 of the Motor Carrier Act of 1935 is nothing more or less than the language of Section 5 of the Transportation Act of 1920, as amended

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[20A] Conversely, if it was the expectation of Congress that the Commission would or should apply the Antitrust Laws in passing upon combinations and mergers, the explicit prohibition against approval of rail-truck mergers, without finding that they will not unduly restrain competition, becomes incomprehensible.

[21] 49 State. 543, 555. 54 Stat. 898, 905.

Provisions for conforming integration of rails to a general plan were repealed and eliminated in the Transportation Act of 1940, principally because of the situation illustrated in the Report of the Committee of Six appointed September 20th, 1938 by the President of the United States:

> "The fact that consolidation of railroads has not been carried out to an even greater extent is in our opinion ascribable to two factors. Prior to 1920 it was retarded by the prohibitions of the Antitrust Laws. Since that date it is hampered by the unduly restrictive provisions of Section 5 of the Interstate Commerce Act with their requirement for a rigid plan developed in accordance with a prescribed formula, which militates against any results that are not highly artificial and unattractive."

through 1933, and with such minor adaptations and omissions as were necessary to relate its provisions to motor carriers.

With this clearly understood, it becomes plain that the policy of Congress, since it first undertook to assume a position of positive public responsibility towards the fostering and maintenance of a stable and improved national transportation system in 1920 and entrusted to the Commission constructive functions, has hewed constantly to that line. Contentions in the briefs of the appellants to the effect that the repeal of requirements for a plan of consolidation, the recapture clause, and the like, rather than indicating a change of basic policy, indicate only the Congressional trend towards entrusting to the Commission, in its wisdom and experience, the carrying out of the National Transportation Policy within the broad framework of the specific Congressional enactments.[22]

We fail to perceive how repeated extraneous and prejudicial references to right-of-ways being owned by railroads are any indication that the courts or the Commission should discriminate in favor of such competing form of transportation or that the Commission and the courts, in construing the language of Section 5-11 of the Transportation Act of 1940, should attach to such language its clear meaning in dealing with a merger between railroads but, in considering a merger solely between motor trucks,

[22] Forensic devices, such as cutting off investigation of the heredity of Section 5 in 1935 by making comparisons of the Motor Carrier Act of 1935 with the Transportation Act of 1920 and eliminating from such consideration the amendments through 1933, should be too transparent to require rebuttal. Standing in the same category is the argument that Sections 5-11 does not relieve the Commission from applying and giving effect to the Antitrust Law and is operative only upon the carriers and not upon the Commission. If such reasoning can be used to support a claim that the Commission should apply the Antitrust Laws, it would seem to imply an equal obligation on the Commission to apply and enforce "all other restraints, limitations and prohibitions of federal, state or municipal law." (Sec. 5-11.)

should lay aside the body of decisions dealing with this language over twenty years and find that the same language in the same section of the same law means something else as to motor carriers.

In entrusting the destiny of motor truck transportation to the Interstate Commerce Commission, Congress in 1935 and again in 1940 provided in the phrase "consistent with the public interest" the basic criteria for weighing approval of unifications[23]. The Commission has consistently held since 1935 that a unification transaction may be consistent with the public interest without being required by public convenience and necessity[24]. Guided by the pronouncements of the Court in *New York Central Secur-*

[23] Section 213, Motor Carrier Act of 1935; Section 5 (2) (b), Interstate Commerce Act of 1940.

[24] One implication of the appellants' contention with respect to their tortured meaning of the word "adequate" would be that Congress intended it should be read as a requirement of a showing of "public convenience and necessity". The answer to this, of course, is when Congress meant public convenience and necessity, it said so in so many words as, for example, in Sections 206 and 207 of the Interstate Commerce Act, as well as the corresponding Sections in the Motor Carrier Act of 1935, and which Sections provide for the showing to be made when it is sought to inaugurate new operations by motor truck. The considerations of requirements of public convenience and necessity have, since the passage of the Motor Carrier Act, been held by the Commission to deal only with the question of whether or not an original certificate to operate should be granted and that they have no place in unification proceedings. *Horlicher Delivery Service, Inc.—Purchase*, 35 M. C. C. 149 (1940); *Herrin Transport Co.—Purchase*, 35 M. C. C. 88 (1939); *Trans-American Freight Lines, Inc.—Purchase*, 5 M. C. C. 712 (1938); *Keeshin Motor Express Co., Inc.—Leases*, 1 M. C. C. 373 (1936). In *Baggett Transf. Co.—Purchase*, 36 M. C. C. 659, the Commission stated:

> "Nor are we authorized in a proceeding under Section 5 to order the issuance of our certificate to cover the acquired intrastate operation. Section 206 provides exclusive method and the sole standards by and under which we may issue a certificate. The primary standard there established is the existence of public convenience and necessity. The standard for our approval under Section 5 is consistency with the public interest. * * * Public convenience and necessity, as we have frequently defined it, ordinarily requires a higher degree of proof than mere consistency with the public interest, and usually contemplates an entirely distinct set of circumstances."

ities Co. vs. United States (Supra), Texas vs. United States (Supra), United States vs. Lowden, 308 U. S. 225 (1939), and other cases as to the elements of public interest, they have made improved public transportation their primary aim, and in so doing have given effect to the National Transportation Policy, as expressed in the Act, of providing for fair and impartial regulation of all modes of transportation, so administered as to recognize and preserve the inherent advantages of each, thus promoting safe, adequate, efficient service and fostering sound economic conditions in transportation and among the several carriers, to the end of developing, coordinating and approving a National Transportation system by water, highway and rail adequate to meet the needs of commerce. As charged by the Statute, they have administered and enforced the provisions of the Act with the view of carrying out the declaration of policy[25].

While Congress with design, having in mind the decisions of the Commission and the courts, expressed no specific restrictions on the manner and extent to which the Commission might permit elimination of competition in unifications solely between motor carriers, nevertheless the Commission, in applying the test of "consistency with the public interests", has recognized that undue elimination of competition could be inconsistent with or inimicable to the public interest. They have recognized that acquisitions and mergers between motor carriers could be carried to a point in given cases where the elimination of competition resulting therefrom would be "inconsistent with the public interest". Stated another way, competition in a given case could be reduced to the point where it interfered with the spirit and purposes of the Transportation Act, just as undue restraints on the elimination of competition can

[25] Transportation Act of 1940, Section 202; 54 Stat. 899.

thwart the public purpose of that Act and stultify and hamstring the Interstate Commerce Commission in its effort to provide the country with improved transportation service. In various cases since the passage of the Act in 1935 applications have been denied on the ground of undue elimination of competition.[26] The Commission has also recognized that under the Motor Carrier Act of 1935 and the Transportation Act of 1940 something more than elimination of competition is necessary for disapproval. In the field of transportation, elimination of competition may not only be compatible with the public interest but directly in the public interest, and in the motor truck industry, characterized as it is by severe and excessive competition both within and without, any danger of monopoly is indeed remote. Notwithstanding this situation, in the *Transport case* (*Supra*), a unification of twenty-nine motor carrier companies, the Commission was imbued with such caution that, having expressed "doubt" as to the sufficiency of remaining competition, it added this doubt to its long list of reasons for denial. Perhaps it was the fact of such inclusion, or perhaps a result of the undue emphasis on this aspect of the case by the appearance and activity of the Anti-trust Division, which led the Commission, on the different facts in the instant case, specifically to set forth its finding that there would remain ample competitive motor carrier service through the territory involved (R. 32) and that "the proposed transaction would not result in undue restraint of competition" (R. 37). In any event, such a finding, although not required by statute, has the beneficial effect of giving direct expression to the result

[26] *Northland-Greyhound Lines, Inc.*, 5 M. C. C. 123 (1937); *Eastern Michigan Transportation Corp.*, 25 M. C. C. 483 (1939); *Richmond Greyhound Lines, Inc.*, M. C. F. 119 (1941); and *Transport Company—Control—Arrow Carrier Corp.*, 36 M. C. C. 61.

of considerations given *weight*[27] by the Commission in every merger case under its conception of "consistency with the public interest" since it was charged with the regulation of the trucking industry in 1935, and thoroughly reconciles any finding of elimination of substantial competition with the finding that the merger is consistent with the public interest:

The shippers, the farmers, the general public, and the trucking industry itself would indeed face a bleak transportation future were there to be general acceptance of a way of thought which conceives regulation solely from a policeman's or prosecutor's perspective. Was it the theory of Congress in providing for motor truck legislation that this great young and growing industry should be

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[27] Having arrived, by a series of forced marches, to the unfortified position that Congress, by the passage of the Transportation Act of 1940, had reverted to the turn of the century and evidenced an intention to substitute the inflexible restrictions of the Antitrust Laws for the admitted progressive policy of coordination, construction and improvement through the agency of the Interstate Commerce Commission, and the application of transportation criteria to regulation in the transportation field, appellants follow with the pseudo corollary allegation that no merger may be approved unless in no other way can the public be insured of adequate transportation service. They thereupon reached the conclusion that the Commission erred in failing to make a finding that the existing motor carrier service is inadequate (in the sense of "insufficient") before approving the merger. It is submitted that this is only another way of urging that it was the intention of Congress that it be the primary obligation of the Commission to enforce and administer the Antitrust Laws in merger proceedings rather than Section 5 of the Transportation Act. The courts have interpreted the Antitrust prohibitions as meaning that "unreasonable" restraints are forbidden. The appellants' insistence on such a finding again seems another way of stating that in the absence of such a finding a merger is an unreasonable restraint of trade and a violation of the Antitrust Laws. It is to be noted, however, that the language used by Congress in the Transportation Laws when referring to restraints of competition is "unduly restrain competition". If appellants, as did Mr. Thurman Arnold on the oral argument of this case (R. 427), suggest that the words "unduly" and "unreasonable" are interchangeable, then we submit that the Commission's finding (R. 37) "that the proposed transaction would not unduly restrain competition" has fully satisfied appellants' objection: *Appalachian Coals, Inc., et al. vs. United States*, 288 U. S. 344 (1933).

frozen in its then state of development, and that if such state of development provided *barely* "adequate" (or "sufficient") service, then regardless of potential improvements and betterments, these must be denied to it, because the appellants would give to the Anti-trust Laws, passed at the turn of the century and intended for the regulation of then unfettered and unregulated businesses, the force and effect of amendment to the Constitution.[28]

While it is clear that the Commission in a proper sense has both directly and impliedly found that service available prior to the merger was inadequate compared to the betterments available and that the granting of the application would bring about adequate service, stripped of their camouflage the appellants' arguments are disclosed as a complaint that the language used in respect to the finding is "consistency with the public interest" rather than "adequacy of service". It is equally clear from the Statute that the technical requirement, if any, with respect to the use of words which Congress placed upon the Commission in Section 5-(2) was only to make findings as to "consistency with the public interest".

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[28] It must be at all times remembered that the trucking industry is completely regulated as to its rates, fares, charges, practices, accounting, and operations, not only by the Interstate Commerce Commission but in great part and even to the point of confliction in regulatory processes by the Public Utility Commissions or other bodies in the separate states in which it operates as well. Recently to this mass of regulation has been added the detailed and exacting requirements of the Office of Defense Transportation (Executive Order No. 8989, December 18, 1941), and the Antitrust Division, through its claimed powers under the Antitrust Laws, insists that steps taken to comply with the orders of the O. D. T. be confined only to acts meeting the Division's approval and has for that purpose adopted what amounted to rules and regulations pertaining thereto, thus asserting broad, effective and restrictive powers of regulation over transportation even in the present emergency.

II.

The Commission's findings are amply supported by the evidence.

The purpose of this cooperative merger venture by the owners of the seven lines involved, as described by them at various times in the proceedings, was

(1) To offer to the public a complete and speedier service in a large but somewhat sharply defined area along the eastern seaboard.

(2) To be a unit of sufficient size as to make possible public financing for working capital.

(3) To be of sufficient size to command reasonable purchasing power in the acquisition of equipment supplies, insurance and credit.

(4) To obtain geographical spread of the risk of fluctuations and the flow of freight, and to be in a position to compete for freight diverted from the north to the south or vice versa by industrial shifts.

(5) To increase the load factor and otherwise utilize equipment and facilities more intensely so that the present extraordinarily increased business may be handled without proportionate increase of equipment. This increase of equipment would be neither financially sound nor financially possible.

(6) To secure a more intensive use of equipment and facilities by increasing the load factor, and to "turn over" capital more rapidly and thus increase profits and avoid useless and wasteful obsolescence and to utilize technological improvements sooner and more fully.

(7) To be enabled to compete more evenly with rail, carloading, express and water carriers who enjoy many advantages of financing and coverage not possessed by

the truck lines individually, as well as to prepare to meet intensified airplane competition which seems just ahead.

(8) To effectuate economies of operation so that present rates may be maintained, lowered or held within reasonable competitive limits in the rapidly rising market of supplies and labor.

(9) To insure, for years to come, competent and experienced management of these properties against the hazards of death and disability.

(10) To create some kind of a market for the preferred stock in which cash could be obtained to pay inheritance taxes upon the death of any major stockholder of one of these companies and thus avoid the necessity of a forced sale of at least a substantial interest to carriers by rail, who doubtless would be the only source of funds at such a time.

(11) To accomplish all of the above with no elimination of competition other than that presently within the group, and which elimination is necessary, desirable and incidental to the major purpose of preserving and perpetuating these businesses and fostering a finer, sounder and more desirable system of transportation by motor truck in the territory and in the public interest.

Such purposes were entirely in harmony with the National Transportation Policy "to promote safe, adequate, economical, efficient service, and foster sound economic conditions in transportation and among the several carriers * * *, all to the end of developing, coordinating and preserving a national transportation system by water, highway and rail * * * adequate to meet the needs of commerce of the United States, Postal Service and of the National Defense."[29]

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[29] Transportation Act of 1940, Section 202; 54 Stat. 899.

Consistent with the testimony, the Commission found, among other things, that the consolidation would result in improved transportation service, that through movement of freight would be simplified and expedited, equipment would be fully utilized, terminal facilities improved, handling of shipments reduced, relations with shippers and public regulatory bodies simplified, safe operation promoted, that consolidation would result in substantial operating economies,[30] ample competition would remain, and competition would not be unduly restricted.

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[30] In the brief of the appellant, Secretary of Agriculture, there is cited the Report of the Interstate Commerce Commission in *Increased Common Carrier Truck Rates in the East*, 42 M. C. C. 633, 646. Apparently this case is cited as a vehicle for the amplification of the record certified to this Court by the District Court to the extent of showing that losses were sustained by Associated Transport during its first three months of combined operation. We desire to italicize the Commission's expression of opinion to the effect that "economies and increased efficiency of combined operation cannot be put into effect immediately". It must be recognized that reduction of cost flowing from increased purchasing power and substantial changes in terminal setups were projected in 1941, prior to the war, and to be accomplished under conditions of peace. Critical shortages of building materials, operating labor and rolling stock tend to increase cost almost in proportion to the needs of larger companies compared to smaller ones. Unfortunately in this rate case the 1942 *annual* reports of the predecessor companies prior to combined operation were before the Commission. Such reports do not disclose the operating results of the individual constituent companies in the last few months to combined operations.

Since the appellant, Secretary of Agriculture, has chosen to refer to this case, we submit that the ultimate significance of the citation is that the Commission's language and tables attached to the decision demonstrate the continued growth and prosperity of the smaller carriers in the territory, particularly in the area formerly served by the Horton and Barnwell Companies, and the reduction in the gross business of Associated as compared to its constituent companies. The figures demonstrate no lack or restraint of competition nor any other of the adverse effects on independent truckmen prophesied by appellants.

In reading this decision, one should mark, as substantiation of the fears and reasons which impelled the seven companies to embark on this merger, that Arrow Carrier Corporation (now divorced from both Associated and Kuhn, Loeb & Co. and whose operations were concededly uncompetitive with Associated) met serious reverses and lost substantial money for practically the first time in its history.

Proof of anticipated economies and improvement of service necessarily must be of a *pro forma* or opinion character.[31] Testimony as to anticipated results can only be weighed in the light of qualifications and experience of the witnesses. The Interstate Commerce Commission, being a body itself experienced in regulating transportation, should be peculiarily qualified to weigh such testimony. Some of the companies involved in the application had achieved a considerable measure of success in a chaotic industry and had had experience in other mergers, and thus their operating heads were adequately qualified as outstanding experts in the field of truck transportation. The fact that they, the most substantial stockholders themselves in the constitutent companies, were so convinced of the merits and necessity of effectuating this cooperative merger that they were willing to pool their stock and voluntarily surrender highly remunerative long-term contracts constituted irrefutable evidence of the sincerity of their testimony.[32]

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[31] In one instance it was possible to give direct testimony of anticipated savings, and this was in the case of insurance. B. M. Seymour testified (R. 578) to firm offers from insurance companies which would bring about direct annual savings of over $250,000.

[32] It is stated in the brief of appellant McLean that to prevent competition arising in the future, the companies involved had made long term contracts with the principal operating heads of said companies. This is not true. The record discloses and the Commission found (R. 447) that the seven companies, party to this merger, have no contracts and that such of these companies as had contracts brought about the cancellation thereof prior to the application to the Commission, even though in some cases there were contracts having many years to run which had already been approved in other mergers by the Commission. Because of the strained relationship between Arrow Carrier and Kuhn, Loeb and Associated Transport, contracts were intended to be made with the heads of that company (R. 44). The fact that Arrow could not be included removed such question.

The appellant McLean also urges the Court that to insure a monopolistic position, requirement was made in the merger contracts that consummation be conditioned upon the inclusion of five of the original eight carriers. This statement also is not in accordance with the facts. A reading of paragraph

The testimony of traffic managers, representative of large and small shippers throughout the territory, confirmed and supported the testimony of the operators as to the necessity for and the desirability of the merger. Many of these shippers were officers or directors of influential traffic groups, chambers of commerce, and other public organizations interested in improved transportation service. Uniformly these expressed themselves as not being fearful of monopoly or other deleterious effects on competition.[33]

Any statement to the effect that there would exist no motor carrier competitor of Associated Transport shows a fundamental misconception of the nature of the trucking business. Appellants (but not the Interstate Commerce Commission) lose sight of the fact that the main volume of Associated's traffic will and must move in the future in the same parts of the territory and between the same points and places as it has moved in the past. The hun-

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15 of the merger contract (R. 173) and the succeeding paragraphs show that the consummation of the merger was not finally conditioned upon the inclusion of any particular company. Under the contract the Commission's failure to include any of the five companies simply permitted any of the companies, the merger of which might be approved, to review the situation in the light of the Commission's decision and then determine whether they wished to continue in or withdraw from the merger. This being a cooperative venture, balance of power, and submersion of identities were of natural importance to stockholders. In no other way could a firm contract be submitted to the Commission and at the same time could protection be afforded against dominance by a single company. For example, under a firm contract, without such protection, if the Commission approved only the merger of Horton, McCarthy and Moran, Horton under the stock distribution formula would have about sixty per cent of the stock and clear control. Such a situation might and probably would have been unacceptable to McCarthy and Moran. At least it was desirable to reserve decisions as to whether such bridges would be crossed.

[33] A partial list of such witnesses include J. R. Hester (R. 788), John V. Hoey (R. 805), H. A. Faivre (R. 816), W. E. Greer, Jr. (R. 833), Samuel Evans, Jr. (R. 879), Frank Korinek (R. 883), Charles H. Vayo (R. 887), V. R. Tupper (R. 892), Paul Stevens (R. 901), J. J. Autrey (R. 905), E. J. Davis (R. 909), S. V. Rettino (R. 918), C. A. Glymp (R. 934).

dreds of carriers, large and small, outside the merger who constitute the motor truck competition to the constituent companies will continue to constitute such competition.[33A] Their competition may even become substantially more effective since not only is it a natural tendency for smaller lines to gang up on larger ones but, as the shippers testified and the Commission found (R. 34), it is a general practice of shippers to spread their business among two or more lines, with the result of a reduction in busi-

[33A] The evidence devicing the competition of the merger from hundreds of motor carriers throughout the territory was voluminous and complete. Appellant McLean in his brief is critical of the one of the Commission's methods of illustrating Associated's relationship to remaining competition by comparisons of the total gross revenue of the constituent companies of Associated, having all or any substantial part of their operations in a given territory with the total gross revenues of other truck lines having all or a substantial portion of their operations in the same territory, as, for example, the comparison (R. 25) between the combined revenues of Consolidated and McCarthy in New England of $6,000,000 with the combined revenues of other Class I carriers in the territory of $40,000,000. Undoubtedly not all this $40,000,00 of revenue of the competing carriers is obtained wholly within New England, but on the other hand there is no question but what the majority of Consolidated's revenues is obtained from operations to and from other territories than New England and that its New York State, Pennsylvania and New Jersey operations are entirely out of this area. Thus the Commission uses the same basis of comparison for both sets of figures.

On the other hand, in appellant McLean's brief (page 4) there is the statement that "the combined revenues of McCarthy and Consolidated are three times greater than any single company which will be left in the New England area." They are making this comparison of McCarthy's and Consolidated's operations (including the operations just referred to outside of the area) with the operation of truck lines wholly within the area. Such distorted comparisons evidence nothing except an attempt to create prejudice. Equally distorted is the statement on pages 6 and 7 of the brief of the appellant Secretary of Agriculture that Associated will have operating revenues ten times greater than any other motor carrier in the area where it operates. Even to make such a statement technically correct one is required to read it as being a comparison only with other motor carriers having their *entire* operations in the area where Associated operates. Since United States Freight Lines, Inter-State System, and the Keeshin System all have substantial operations in the area (but not exclusively therein), any comparison should be of their revenues of $14,000,000, $9,000,000 and $7,000,000 respectively for 1940 with Associated's $18,000,000 for the same period.

ness to the merger. Approval of the merger could neither change the shippers nor effect their markets. The major part of the business and competition of the M. Moran Transportation Lines, for example, was and must remain in New York State, and the major part of the business and competition of Transportation, Inc. was and must remain in Mississippi, Louisiana, and Alabama. While improvement in service and efficiency in operation may, and it is expected that they will, result in attracting business presently moved by competing forms of transportation, nevertheless this effect will be to enhance the competition with such rail lines, boat lines, and freight forwarders rather than to stifle competition in the trucking industry.[34] Indeed, it appears from the testimony and the Commission's Report that there are in the territory substantial truck lines, such as the Akers Company and Carolina Freight Haulers, who have operating rights and offer direct service from the deep south to as far north and east as New York State and northern Massachusetts, and that within the constituent companies of the merger there were no such operations. The appellant McLean, through this suit (which was his first appearance in the proceedings) and his presently applied-for operations, identifies himself prominently among such carriers. Approval of the merger, which permits through service by Associated, adds to rather than detracts from the competitive situation respecting freight movements between these points.[35]

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[34] See testimony of witness Tupper (R. 896-897), and other shippers; also Applicant's Exhibit 18 (R. 1481); testimony of witness Mead (R. 1139, 1145-1146, 1165); Altwater (R. 857); and Lawson (R. 673).

[35] Comprehension of the conflicting motives, interests and arguments of opponents to the merger is enlightening.

The plaintiff appellant McLean appears to be grieved that a unified service from New England to the South, made possible by the merger, would result in competing with the "property rights" which he claims to have in such a service. Such rights are presently inchoate and can presumably only be es-

Compared with rail, water, air or even motor bus companies, Associated would be small. Gulliver was a giant

tablished if, contrary to appellant's major premise that truck service in the territory is presently adequate, McLean is able to demonstrate to the Interstate Commerce Commission in his Section 207 (new operation) application that the service of other companies is inadequate. (Case No. MC-31389, Sub. 1).

The farmers' interests, as expressed before the full Commission on oral argument by counsel for the Secretary of Agriculture (R. 438-440), was to guaranty truck competition against rail lines by insuring the independence of Associated Transport from rail affiliation ("* * * if this is going to make for more efficient operation, it would be a more efficient competitor of rails * * *" "* * * We are here only because we are fearful that through the participation of this banking house there will be a destruction of this competition between rail and motor carrier.") At the oral argument, W. S. Campfield, an admitted farm lobbyist, representing the intervening fruit growers' associations, assigned the reason for his opposition to the alleged banker interest and to the desire of the fruit growers to keep small truck lines, because equipment of small truck lines was more readily divertible from the regular highway uses to the orchards during picking seasons than was the equipment of large truck lines. He also stated that the railroads should be protected from the *increased competition* which he stated this merger would afford (R. 441-443).

Strangely enough, the Antitrust Division, although its expressed reasons for intervention was its abhorrence of testimony potentially colored by property interests (R. 504), aligns itself with these special interests and cites their intervention with approval and even produces under its aegis as its principal witness a representative of water carriers and shipbuilders (R. 1348). It intervened before the Interstate Commerce Commission in the appellant McLean's 207 application for new operations (*supra*) less than a week before McLean commenced this suit. Such intervention was presumably in connection with the charge that it made a few days before in its application to the Interstate Commerce Commission for the reopening of the Associated case to the effect that parties to the merger through concerted action were opposing applications before the Commission concerning operating authorities of *small* independent motor carriers. (McLean's gross annual business exceeds $1,000,000 and for 1941 had profits amounting to more than double the combined profits of Transportation, Inc. and Southeastern Motor Lines, two of the southern companies in the merger.) The Division expressed itself as desirous of promoting the free-play of competition, but opposed this merger which will enhance truck competition to rail, boat lines, forwarding companies, and air express companies, as well as increasing New England to South truck competition.

to the Lilliputians but a dwarf to the Brobdingnaigans.[36]

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[36] The Commission's Report (R. 35) states:

> "The large size of a motor carrier which would result from a unification alone does not constitute sufficient ground for denial of an application. Application of such a policy would tend to freeze the motor carrier industry at its present level. Such transportation, compared with rail and water transportation, is still in its infancy and arbitrary restrictions upon its natural development into larger units solely by reason of comparative size would not be in the public interest. There are many thousands of motor carriers of property subject to our jurisdiction. Many of these are very small, and small motor carriers are necessary and have a definite place in the industry. On the other hand it would seem that larger motor carrier systems, comparable in size and strength with units of competing forms of transportation, should also have their place in the industry."

The Commission apparently felt that in a well-rounded coordinated national transportation picture there should be motor truck companies capable of giving broad territorial coverage and bearing the relationship in size (considering the smaller size of the industry) that large rail systems bear to the smaller units of that much larger industry. Traffic witnesses testified to the need for a north-south system comparable to the large east-west systems in the motor truck business (R. 890-891). References to the operations of such east-west systems as Inter-State, Keeshin, and the United States Freight Lines, are to be found in the testimony of Altwater (R. 843), Mead (R. 1134), Vayo, etc. (R. 887), and their operations were further before the Commission by virtue of the stipulations in R. 1197-1198 and 670-671 that the Commission or parties might refer to the annual reports of any and all carriers subject to their jurisdiction, as well as to its statistical publications, and by virtue of the stipulation on R. 1105-1106 that the motor carrier dockets of the Commission might be referred to as to operating authority of any carriers. The Commission also refers to such systems in its Report for the purpose of showing that such operations have not resulted in a monopoly or injury to smaller carriers (R. 33). In the same connection and in connection with the competition of rail and forwarding company owned or controlled truck lines, we invite attention to the following from the argument of Mr. Wiprud, representing the Department of Justice on the oral argument before the Commission, and presently representing the Secretary of Agriculture in this appeal:

> "But I think that the basic reason for the impossibility of creating a competing system to the carrier here proposed lies largely in the present relationship of other carriers that have been left out of the merger, that is carriers that operate regionally. We find that many of these carriers are owned by railroads. Take, for instance, the New England Transportation Company; they are owned by the New Haven Railroad. The Buffalo Storage and Delivery Company is owned by the Pennsylvania Railroad. The C & B Transit Company is affiliated with several railroads. And then we find that the Seaboard Freight Lines, Inc.,

Even in the trucking industry Associated would not be appreciably larger in revenues than the United States Truck Lines System nor in territorial area larger than the Inter-State System. The United States Truck Lines System had in excess of $14,000,000 revenue in 1940, as compared with $18,000,000 for Associated Transport's constituent companies. They were the largest truck system in the country in revenues prior to the Associated application. No evidence of the evil results of such sizable operations was produced, and the Commission in its Report indicates the absence of any such results. The record is devoid of any proof that size is inconsistent with the public interest.

The competitive situation as between the constituent companies prior to the merger was as follows:

Southeastern Transportation Lines, Inc. could serve only between points on routes west of Roanoke, Va. and points north and east thereof. As the Commission stated (R. 29), the competition between it and other companies in the merger was slight. The territory from which it drew its business was west of the others' operations (R. 253).

The main operations and business of Transportation, Inc. was south of Atlanta, Ga. It could be competitive with Horton only north of Atlanta, Ga. as far as Greensboro, N. C. and with Barnwell Brothers between Asheville and Greensboro, N. C. (R. 253).

The main routes of Horton and Barnwell were between New York and Philadelphia on the one hand and the Carolinas on the other, and over these routes they were

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supplies the eastern connection for the west-east operation of Keeshin Lines, being a duly owned subsidiary of that company. Liberty Forwarding and Distributing Company is affiliated with Acme Fast Freight (a Forwarding company) Motor Express and Niagara Motor Express are affiliated with the U. S. Freight Lines of Delaware, and so forth and so on." (R. 430.)

directly competitive. However, Horton was also concerned with serving the intermediary territory and had an important route to Pittsburgh from the Carolinas which, while it paralleled the Barnwell route to Winchester, Va. and Cumberland, Md., was restricted to through Pittsburgh traffic (R. 1380). No company in the merger other than Horton served the Pittsburgh territory. Likewise, Barnwell's operations did not extend south of Charlotte, while Horton had extensive operations as far as Atlanta and Rome, Ga. Barnwell on the other hand served many points not served by Horton or any of the other carriers, including the entire eastern shore of Maryland (R. 30 and 253).

In the north, the McCarthy Freight System and Consolidated Motor Lines, Inc. paralleled to a great extent each other's routes in Massachusetts, Rhode Island and Connecticut (R. 253), but the greater portion of the business of Consolidated Motor Lines flowed between the New England States on the one hand and New York, New Jersey and Pennsylvania on the other. McCarthy's rights were local to the above-named states and it was principally a short-haul New England carrier. A major portion of its traffic was in eastern Massachusetts, where Consolidated Motor Lines was weak, whereas in lower Connecticut and western Massachusetts Consolidated was strong and McCarthy Freight System was weak (R. 23).

In the case of Moran, only twenty-five per cent of its over 7,000 miles of routes were paralleled by Consolidated, who was the only one of the merged carriers operating in this territory (R. 253). Almost half of Moran's business was intrastate commerce in New York and Western Pennsylvania (R. 848).

It is thus readily apparent that because Consolidated in transporting a shipment for one of its accounts from Buf-

falo, N. Y. to Hartford, Conn. by way of Albany, although running over several hundred miles of highway on which Moran had operating rights as far as Albany and over New England highways on which McCarthy had rights from the vicinity of Albany to Hartford, was not in competition in through service with Moran or McCarthy even though extensive duplications of highway routes existed. Likewise, Consolidated in moving a shipment from Boston, Mass. to Philadelphia, Pa. traversed highways through New England on which McCarthy also had operating rights almost as far as New York City, and from New York City to Philadelphia traversed highways on which Norton, Barnwell and Southeastern were certificated, and yet the freight being transported was freight which only Consolidated could haul since none of these carriers other than it accepted shipments of such a movement or could offer such a service.

In the compilation of the total highway miles of Associated's constituent companies and the duplicated miles to be eliminated after merging, such considerations were given no weight. The figures of mileage to which we have just referred were supplied for the record as an unexplained statistical exhibit (R. 1501) after the conclusion of the hearing and as a result of a last minute request of the Justice Department. As the Commission found, the extent of elimination of competition cannot be measured by an appearance of approximately one-third overlapping in the highway mileage of operating rights (R. 22).

The Commission stated that the proposed unification was predominently an end-to-end consolidation of complementary operations and that to the extent that there is overlapping, the consolidation will result in elimination of duplications with economies and release and better use of

equipment and terminal space (R. 44). Appellants criticise this statement, but as we have just seen it is in accordance with the facts. In this connection they refer to a remark of Commissioner Splawn in his dissenting opinion[36A] respecting the overlapping of mileage and attempt to give basis for their criticism by dealing solely with highway routes and disregarding the restrictions in operating authorities, the character of the traffic handled, and the origin and destination of such traffic.

The description of operations as "complementary" connotes much more than the relationship of the routes of one company to another. It has to do with the type of company and the character of its operations. This was illustrated in the testimony of the witness Horton who was one of several to discuss this subject. Horton testified (R. 513, 522, 523, 524) in substance that the companies were selected because their geographical location enabled them to deal with the natural flow of freight up and down the Atlantic Seaboard but that in addition to geographical location they were selected because of type of company—short-haul (McCarthy), "peddler" operations (Moran), middle-haul operations (Consolidated), and long-haul

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[36A] In the *Transport case* (*supra*) the Commission used language similar to Commissioner Splawn's in this case where he refers to projected economies. This language was commented upon in the Yale Law Journal, Vol. 50, page 1378, June 1941. After characterizing the conclusion contained in the language was "cavalier", this leading article continued:

> "Strictly interpreted and carefully observed, this dogmatism would bar unification upon a scale more extensive than those now being successfully operated. Skepticism of optimistic estimates of economies is understandable, especially since expansions by Keeshin Transcontinental Freight Lines had portended similar savings which failed to materialize. But to substitute for articulate analysis a rule of thumb which, if consistently applied, would freeze motor carrier operation at its present level is hardly understandable."

operations (Horton, Barnwell, Southeastern and Transportation).[37]

Referring to duplication of highway distance of 13,546 miles[38], we find (R. 1501) that the mileage of Consolidated was 8,229 miles and of Horton was 4,854 miles, or a total of 13,083 miles or a distance for these two companies approximately equal to the total amount of overlapping. Concededly substantially no competition existed between Arrow, Barnwell, McCarthy, Moran, Southeastern and Transportation. Under the circumstances, since the operation of six of the eight companies were indisputably end-to-end (as well as non-competitive) operations, any statement that the merger was *predominantly* end-to-end is amply supported by the facts. The same conclusion is inescapable if we apply the test of revenue.

Of course, as we have seen from an examination of the operations of the respective companies, a large proportion of the Consolidated operations are in competition with no other company in the merger, and this is true as well of a substantial part of Horton's operations.

The necessity for the inclusion of Consolidated and Horton in the merger should be obvious to everyone, as it was to the Commission. Without Consolidated there would have been no connection between New England and the South since the operations of McCarthy did not reach out of New England and the operations of the other companies did not

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[37] Commissioner Splawn recognizes differences in character of operations when he refers to the special contract service with armored vehicles performed by McCarthy. The record shows that this operation was insignificant; that it dealt solely with precious metals, and that Associated had no particular desire to continue it but simply left it to the Commission as to whether the public interest required that it should be continued. The Commission reserved the question of its continuance to a future date when in its normal procedure it would pass on the Grandfather rights of the former McCarthy Company (R. 20).

[38] In these calculations we have included Arrow because their mileage is included in the exhibit and because the Commission's Report was written with them included. Removal of Arrow makes little difference to these figures.

reach into New England. Without Horton much of the southern territory would not have been covered and one could hardly have expected the Commission to approve a merger when without Horton the southern operations would have lacked backbone and approximated an operating deficit. The Consolidated and Horton Companies had the "know how" of inter-territorial operations, the most substantial part of the financial resources, the most complete organizations, and the only constructive maintenance and safety programs.

The record is barren of any substantial opposition testimony in contradiction of the applicant's proof. Four intervening truckmen who testified in the proceeding all claimed that they were not protesting the application, and the net of their testimony was helpful to applicant, some of it being cited in the Commission's Report in support of its findings[29]. The only protestants were the Antitrust Division of the Department of Justice and Super Service Motor Freight Co., a motor carrier competing principally with Southeastern in the Nashville-Knoxville territory and

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[29] J. B. Dempsey of the Mason-Dixon Lines, a carrier, in gross revenue the same size as Barnwell Bros., testified in substance that his service and coverage was better than that of the other southern carriers in the merger, that the territory they serve is more extensive than that involved in the merger (R. 1220), that his company was growing rapidly and he had nothing to fear as to his ability to get along in competition with the merged companies if approved, but that he did feel some concern that he might not receive as much interchange freight as formerly. In support of this contention certain figures on interchange with Consolidated were given by the witness (R. 1208). We submit that if they prove anything it is that Mason-Dixon is systematically diverting its interchange from Consolidated to other carriers, while at the same time the monthly tonnage turned over to Mason-Dixon has been practically uniform. It is presumably this testimony of Dempsey that is the basis for the contention in appellants' briefs that independent motor carriers sought to voice their concern over the adverse effect of the merger on their business, particularly with respect to interchange traffic, and which they say graphically demonstrates that their motion to require all competing carriers in the territory to furnish figures of their interchange freight should have been granted. Examination of these figures upholds the Commission's denial of the motion. Figures of interchange as desired by the Antitrust Division were submitted (Exhibit 28, R. 1503) by Mason-Dixon. Contrary to Dempsey's testimony that Consolidated treated them unfairly, these figures

whose protest was directed solely to Southeastern and concerned issues extraneous to the proceeding Commission Report, R. 43, 44). They gave no testimony.

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disclosed that at New York City Mason-Dixon, during a seven months' period, turned over to carriers not in the merger 14,858,812 pounds of freight and received from such carriers only 4,841,181 pounds, while during the same period they turned over to Consolidated only 459,358 pounds as against 1,274,126 pounds they received from Consolidated (R. 1208). Obviously, in spite of the claims of appellants that independent carriers would be forced to interchange with Associate to get adequate territorial coverage in New England, it appears that Mason-Dixon gave Consolidated less than twenty-five truckloads of freight in seven months, and this apparently only to make a showing of reciprocity for what they received. Dempsey further felt that possibly the combination of these companies would not give him a fair division of rates on interchange. (Apparently he, as did others, overlooked provisions of Section 216, subdivision (F), of the Motor Carrier Act which provides that the Commission may fix divisions as between interchange carriers.) The Examiner, as the judge of the facts, had the advantage of observing Dempsey's appearance and demeanor on the witness stand. For whatever reason of temporary disability or otherwise, he was unable to state within two million dollars the annual gross revenues of the company of which he was manager (R. 1219).

John M. Akers—General Manager of Akers Motor Lines, a million dollar company, testified that his company and several others which he named, none of whom are included in this merger, offer direct service to Southern points, to New England and to New York points; that he had practically no interchange with companies in the proposed unification, and that the granting of the application would effect his operations favorably, because he would have a lesser number of solicitors to contend with than if the companies were operated individually, and that he might expect shippers now using Horton and Barnwell to divert a certain amount of their freight to his and other competing lines if these companies were put together (R. 1266-1282).

C. H. Smith—President of Smith Transfer, of North Carolina, a substantial carrier solely in the southern territory, stated that he was not protesting the application, but that he had appeared solely to bring to the attention of the Commission that he was fearful he might lose some freight which he presently enjoyed through a connection with Horton, plus a lesser amount which he received from the others. He operates 63 units and testified that if he lost all his interchange business with these carriers it would only effect his lines to the extent of two or three units, and that it would have no effect on his ability to render service to the public. He presently interchanges with Mason-Dixon and of course would interchange with the various other lines running through to northern territory (R. 1242-1251).

W. Lewis of Lewis-Holmes Motor Freight Corporation, a southern carrier operating only in that territory, informed the Commission that he had no interchange with Horton and substantially none with Barnwell, that he was not against the application, that his principal volume of business to northern points was carried on with Motor Transit Co., Mason-Dixon, Brooks & Mundy; that Brooks' service is very satisfactory and they are a good carrier all the way to Philadelphia, New York and Jersey points (R. 1251-1265).

The avowed purpose of the intervention of the Antitrust Division in this proceeding, as set forth in their letter under date of August 15th, 1941, addressed to Chairman Eastman of the Commission (R. 504), is as follows: "The reason for my request is that jurisdiction to determine whether unification of carriers unduly restrains competition has been given to the Interstate Commerce Commission. The Anti-trust Division is the only government agency in a position to present evidence on the monopoly question from a point of view of the public interest. Evidence presented by private parties necessarily must be colored by their own property interests in the controversy. Therefore, we feel that it is part of our duty to complete the record before the Commission with such evidence as we have discovered in our investigation of transportation monopolies." Presumably the Commission accepted this communication at its face and, in good faith, thereafter issued an order permitting the intervention of the Division.

Significantly, however, at no time during the hearing did the Division endeavor in any manner to produce testimony respecting any investigation which they had made in the past of alleged transportation monopolies.

F. E. Berquist, an employee of the Antitrust Division, who admitted he had no experience or knowledge of the business of transporting freight by motor truck, attempted, as a statistician, to present his interpretations or conclusions from certain data contained in the annual financial reports of motor carriers to the Interstate Commerce Commission. His testimony was necessarily stultified by a total lack of trucking experience and the natural limits of the sources from which he chose to obtain his information, since these annual reports are not designed fully to describe the territory, service and operating rights of the carriers, neither do they nor are they intended to indicate

the proportion of total tonnage or revenue derived from any part of any route[35A]. (A less charitable interpretation could be placed on his "conclusions" and on that portion of his testimony in which he attempted to show the limits of the territory and service of other than Class I carriers.) So far as data, obtained under these circumstances, could have any probative value, it confirmed the testimony on the same subject offered by applicant whose exhibits and testimony were based on actual knowledge by the witnesses and the Commission's dockets showing the operating authority of competitors. (R. 1286-1348.)

Theodore Brent, the other witness of the Antitrust Division, while admitting that a merger would probably result in an improved transportation service, felt that the same result could be accomplished over a long period of time, solely through the interchange of equipment between large numbers of the presently existing carriers. He agreed with the applicant that the present practical difficulties of such a plan were great, but asserted that the day might come when substantially complete standardization of equipment and improved financial situation of truckmen would make this possible. He did not explain by what means the necessary standardization of equipment or improvement in financial position could be brought about, but seemed to deem it sufficient that railroads, after more than half a century and the expenditures of hundreds of millions of dollars, had achieved standardization of equipment enabling free interchange. Mr. Brent stated in effect that trucks cannot and do not successfully compete with water transportation and that rails do not and cannot success-

[35A] Either Berquist's ignorance of the transportation business or his "prejudice" was so complete as to render his so-called "studies" ridiculous. For example, he testified that Cannon Mills, probably the largest cotton mills in the world, made tobacco products and classified the truckmen serving them as "tobacco haulers" (R. 1292).

fully compete with trucks. In this connection it may be noted that the Commission in the *Transport Case, supra,* apparently took a different view of the extent, severity and danger to truck lines of rail competition in the territory here involved when it wrote in that case "there is even less justification for the issue of securities by the motor carrier industry on the basis of past earnings, as the position of the motor carrier industry in the transportation field is not yet fully developed. This is particularly true in connection with motor carrier service such as is here contemplated, much of which would be competitive with rail and water service and the earnings from which might be adversely effected by any change in the rates of competing forms of transportation."

In any event little importance can be attached to the testimony of this witness. The record discloses that he prepared and wrote out his testimony in final form, having before him only the preliminary testimony of the applicant, and that he was neither present at the hearings nor had he read or discussed any of the testimony or exhibits offered during the last half of the hearing. Brent's knowledge of the merger was so confused that he stated (R. 1350), "An examination of the contentions of applicant and the testimony of traffic witnesses demonstrates that the lines to be merged concern themselves only with long-haul traffic between New York and New England on the one hand and points in Virginia, Tennessee, the Carolinas and Georgia in the south on the other." Later, in contravention of Berquist's testimony, he named twenty-nine motor carriers competing with Horton, Barnwell and Southeastern between the Carolinas and Tennessee and the metropolitan district of New York and Philadelphia (R. 1357).

It is indeed an anomaly that the Antitrust Division, having expressed themselves in their petition for inter-

vention as fearful of testimony potentially colored by property interests, should have produced the witness Brent, a paid employee of water carriers and dockbuilders, who from his demeanor, testimony and admissions might well be characterized as a lobbyist for water transportation interests. Certainly his testimony and attitude disclosed his obvious fear that the proposed merger, by reason of its territorial scope, could offer competition to water transportation, which he stated, in effect, enjoyed a virtual monopoly of the traffic between the Middle Atlantic States and Gulf ports (R. 1348-1367).

Touching the allegations of error in the Commission's denial of the Antitrust Division's petition for reopening and rehearing and argument and reconsideration of its decision in the Associated case, we direct the attention of the Court to the reply of Associated Transport, Inc. in the record of these proceedings (R. 486). It will be observed that the charges in the said petition continued to the effect that Associated had or could variously conspire with labor unions, traffic bureaus and itself equally to injure other truckmen and obtain a monopoly of highway transportation and refers to matters peculiarly pertinent to the proper sphere of the activities of the Antitrust Division of the Department of Justice. If Associated Transport, or its constituent companies, was or had been engaged in such activities, they were all matters either punishable or preventable under the Antitrust Laws, and it would seem that the Division could afford useful cooperation to the Interstate Commerce Commission in restraining such violations, if they existed. On the other hand, if the allegations were in the nature of "prophesies", and since any fear of their fulfillment would involve an assumption of the failure of the Antitrust Division to carry out its plain duty, in the future, there would seem no reason for the Commission to reach a conclusion other than it did.

Conclusion.

It should be recognized that the Antitrust Division having decided, for whatever reasons of its own, to usurp the regulation of transportation facilities, and having elected this case as a beach-head for its infiltration into the regulatory processes, then regardless of the evidence or the merits of the application, it was bound, for reasons of tactics and expediency, to assume and contend by every means in its command that the application was monopolistic and inimical to the public interest.

We here state that our comment and criticism of the attitude of the Division is not intended as a personal reflection on any of its personnel, for whom individually we have the highest regard, but is directed rather at their group attitude or philosophy, which has been well characterized by Max Lerner[40] as the "corrosive detachment" school of economics. Whatever the justification for such philosophy and tactics on the part of governmental agencies in attempting to police and restrain unfettered and rampant free enterprise, we submit it has no place for its application in an industry now well regulated and properly dominated by the extensive and adequate provisions of the Interstate Commerce Acts and an experienced, competent and honorable Commission.

The Commission has rendered its considered judgment of the merits of this application and its administrative determination in carrying out the regulatory processes under and by virtue of the statutory guidance and its decision should be clothed with a high degree of finality. Judicial review of the legitimate exercise of discretion would relegate the method of administrative control to a subordinate status and would defeat the very purposes for which

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[40] *Ideas Are Weapons*, Viking Press, 1939.

the Commission's vast grants of flexible authority were conferred[41].

The courts have long been self-denying in allowing dominance of the Commission in its appropriate sphere in accordance with the general legislative purpose of establishing administrative control[42]. "If the order made by the Commission does not contravene any constitutional limitation, and is within the constitutional and statutory authority of that body, and not unsupported by testimony, it cannot be set aside by the courts, as it is only the exercise of an authority which the law vests in the Commission."[43]

It is respectfully submitted to the attention of the Court that considered in the light of the plain facts of this case and the total lack of connection between the opponent's arguments and the law which the Commission is charged with administering, there seems to be no escape from the conclusion that the Antitrust Division, pursuing the concept peculiar to its economic and political philosophy, seeks, through the intervention herein, by extra-legislative process to nullify the Motor Carrier Regulatory Acts and to

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[41] Sharfman, *The Interstate Commerce Commission*, Part II, page 384.

[42] Reference is made to the *Federal Trade Commission*, by Jerard C. Henderson (1924), pages 97-98:

> "In the case of the Interstate Commerce Commission, the Supreme Court itself, with but slight aid from the text of the law, has created in a notable series of cases, a category of 'administrative questions', upon which it will refuse to substitute its judgment for the judgment of the Commission, and into which indeed courts may not inquire until the Commission has made its rulings. These cases do not rest upon any supposed distinction between questions of fact and law; generally they are neither, but merely judgments of a practical character. They do not rest upon any statutory limits on the right of review. They rest on a statesmanlike comprehension of the purpose and function of administrative enforcement and of the importance of expert decision upon questions of great economic importance."

Also, *The Interstate Commerce Commission vs. Illinois Central R. R.*, 215 U. S. 452 (1910); *Procter & Gamble Co. vs. United States*, 225 U. S. 282 (1912).

[43] *Pennsylvania Co. vs. United States*, 236 U. S. 351, 361 (1915).

negative the powers of the Motor Carrier Regulatory Body for the dual purpose of imposing their concept of a "free market" in transportation and transferring the policing of the Industry to the Division's group of economic and legal technicians who, to paraphrase Mr. Thurman Arnold's book, would then become the Bottleneck of the Trucking Industry.

Accordingly it is prayed that this appeal be dismissed.

Respectfully submitted:

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Dated: October 1943.

APPENDIX.

National Transportation Policy (54 Stat. 899).

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

An Act to Regulate Commerce, February 4, 1887 (24 Stat. 379, 380).

Sec. 5.—That it shall be unlawful for any common carrier subject to the provisions of this Act to enter into any contract, agreement or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense.

TRANSPORTATION ACT OF 1920 (41 STAT. 456, 480).

SEC. 407. The first paragraph of section 5 of the Interstate Commerce Act is hereby amended to read as follows:

"SEC. 5. (1) That, except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of section 1 of this Act, it shall be unlawful for any common carrier subject to this Act to enter into any contract agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid each day of its continuance shall be deemed a separate offense: *Provided*, That whenever the Commission is of opinion, after hearing upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this Act, or upon its own initiative, that the division of their traffic or earnings, to the extent indicated by the Commission, will be in the interest of better service to the public, or economy in operation, and will not unduly restrain competition, the Commission shall have authority by order to approve and authorize, if assented to by all the carriers involved, such division of traffic or earnings, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises.

"(2) Whenever the Commission is of opinion, after hearing upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this Act, that the acquisition, to the extent indicated by the Commission, by one of such carriers of the control of any

other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the Commission shall have authority by order to approve and authorize such acquisition under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises.

"(3) The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1) or (2), as it may deem necessary or appropriate.

"(4) The Commission shall as soon as practicable prepare and adopt a plan for the consolidation of the railway properties of the continental United States into a limited number of systems. In the division of such railways into such systems under such plan, competition shall be preserved as fully as possible and wherever practicable the existing routes and channels of trade and commerce shall be maintained. Subject to the foregoing requirements, the several systems shall be so arranged that the cost of transportation as between competitive systems and as related to the values of the properties through which the service is rendered shall be the same, so far as practicable, so that these systems can employ uniform rates in the movement of competitive traffic and under efficient management earn substantially the same rate of return upon the value of their respective railway properties.

"(5) When the Commission has agreed upon a tentative plan, it shall give the same due publicity and upon reasonable notice, including notice to the Governor of each State, shall hear all persons who may file or present objections thereto. The Commission is authorized to prescribe

a procedure for such hearings and to fix a time for bringing them to a close. After the hearings are at an end, the Commission shall adopt a plan for such consolidation and publish the same; but it may at any time thereafter, upon its own motion or upon application, reopen the subject for such changes or modifications as in its judgment will promote the public interest. The consolidations herein provided for shall be in harmony with such plan.

"(6) It shall be lawful for two or more carriers by railroad, subject to this Act, to consolidate their properties or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership, management, and operation, under the following conditions:

"(a) The proposed consolidation must be in harmony with and in furtherance of the complete plan of consolidation mentioned in paragraph (5) and must be approved by the Commission:

"(b) The bonds at par of the corporation which is to become the owner of the consolidated properties, together with the outstanding capital stock at par of such corporation, shall not exceed the value of the consolidated properties as determined by the Commission. The value of the properties sought to be consolidated shall be ascertained by the Commission under section 19a of this Act, and it shall be the duty of the Commission to proceed immediately to the ascertainment of such value for the properties involved in a proposed consolidation upon the filing of the application for such consolidation.

"(c) Whenever two or more carriers propose a consolidation under this section, they shall present their application therefor to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties sought to be consolidated is situ-

ated and the carriers involved in the proposed consolidation, of the time and place for a public hearing. If after such hearing the Commission finds that the public interest will be promoted by the consolidation and that the conditions of this section have been or will be fulfilled, it may enter an order approving and authorizing such consolidation, with such modifications and upon such terms and conditions as it may prescribe, and thereupon such consolidation may be effected, in accordance with such order, if all the carriers involved assent thereto, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

"(7) The power and authority of the Commission to approve and authorize the consolidation of two or more carriers shall extend and apply to the consolidation of four express companies into the American Railway Express Company, a Delaware corporation, if application for such approval and authority is made to the Commission within thirty days after the passage of this amendatory Act; and pending the decision of the Commisison such consolidation shall not be dissolved.

"(8) The carriers affected by any order made under the foregoing provisions of this section and any corporation organized to effect a consolidation approved and authorized in such order shall be, and they are hereby, relieved from the operation of the 'antitrust laws,' as designated in section 1 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, and of all other restraints or prohibitions by law, State or Federal, insofar as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section."

SEC. 408. The paragraph of section 5 of the Interstate Commerce Act, added to such section by section 11 of the Act entitled "An Act to provide for the opening, maintenance, protection, and operation of the Panama Canal and the sanitation and government of the Canal Zone," approved August 24, 1912, is hereby amended by inserting "(9)" at the beginning thereof.

The two paragraphs of section 11 of such Act of August 24, 1912, which followed the paragraph added by such section to section 5 of the Interstate Commerce Act, are hereby made a part of section 5 of the Interstate Commerce Act. The first paragraph so made a part of section 5 of the Interstate Commerce Act is hereby amended by inserting "(10)" at the beginning thereof, and the second such paragraph is hereby amended by inserting "(11)" at the beginning thereof.

AN ACT TO AMEND SECTION 407 OF THE TRANSPORTATION ACT OF 1920, ENACTED JUNE 10, 1921 (42 STAT. 27).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Section 407 of the Transportation Act of 1920 be, and it is hereby, amended by adding thereto a new paragraph designated as paragraph 9 as follows:

"(9) Upon the application of one or more telephone companies for authority to consolidate their properties or a part thereof into a single company, or for authority for one or more such companies to acquire the whole or any part of the property of another telephone company or other telephone companies or the control thereof by the purchase of securities or by lease or in any other like manner, when such consolidated company would be subject to this Act, the Commission shall fix a time and place for a public hearing upon such application and shall thereupon give reasonable

notice in writing to the Governor of each of the States in which the physical property affected, or any part thereof, is situated, and to the State Public Service Commission or other regulatory body, if any, having jurisdiction over telephone companies, and to such other persons as it may deem advisable. After such public hearing, if the Commission finds that the proposed consolidation, acquisition, or control will be of advantage to the persons to whom service is to be rendered and in the public interest, it shall certify to that effect; and thereupon any act or acts of Congress making the proposed transaction unlawful shall not apply. Nothing in this paragraph contained shall be construed as in any wise limiting or restricting the powers of the several States as now existing to control and regulate telephone companies."

EMERGENCY RAILROAD TRANSPORTATION ACT OF 1933
(48 STAT. 211, 217).

SECTION 201. Section 5 of the Interstate Commerce Act, as amended (U. S. C., title 49, sec. 5), is amended by striking out paragraphs (2) and (3) and by renumbering paragraphs (4) and (5) as paragraphs (2) and (3), respectively, and by striking out the last sentence of the paragraph so renumbered as paragraph (3).

SEC. 202. Such section 5 is further amended by striking out paragraphs (6), (7), and (8), and by inserting in lieu thereof the following paragraphs:

"(4) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b), for two or more carriers to consolidate or merge their properties, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract

to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through purchase of its stock; or for a corporation which is not a carrier to acquire control of two or more carriers through ownership of their stock; or for a corporation which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock.

"(b) Whenever a consolidation, merger, purchase, lease, operating contract, or acquisition of control is proposed under subdivision (a), the carrier or carriers or corporation seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants, of the time and place for a public hearing. If after such hearing the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed consolidation, merger, purchase, lease, operating contract, or acquisition of control will be in harmony with and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraph (3), and will promote the public interest, it may enter an order approving and authorizing such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon the terms and conditions and with the modifications so found to be just and reasonable.

"(5) Whenever a corporation which is not a carrier is authorized, by an order entered under paragraph (4), to acquire control of any carrier or of two or more carriers, such corporation thereafter shall, to the extent provided by the Commission, for the purposes of paragraphs (1) to

(10), inclusive, of section 20 (relating to reports, accounts, and so forth, of carriers), including the penalties applicable in the case of violations of such paragraphs, be considered as a common carrier subject to the provisions of this Act, and for the purposes of paragraphs (2) to (11), inclusive, of section 20a (relating to issues of securities and assumptions of liability of carriers), including the penalties applicable in the case of violations of such paragraphs, be considered as a "carrier" as such term is defined in paragraph (1) of such section, and be treated as such by the Commission in the administration of the paragraphs specified. In the application of such provisions of section 20a in the case of any such corporation, the Commission shall authorize the issue or assumption applied for only if it finds that such issue or assumption is consistent with the proper performance by each carrier which is under the control of such corporation of its service to the public as a common carrier, will not impair the ability of any such carrier to perform such service, and is otherwise compatible with the public interest.

"(6) It shall be unlawful for any persons, except as provided in paragraph (4), to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (7), the words 'control or management' shall be construed to include the power to exercise control or management.

"(7) For the purposes of paragraphs (6) and (11), but not in anywise limiting the application thereof, any transaction shall be deemed to accomplish or effectuate the control or management in a common interest of two carriers—

"(a) If such transaction is by a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier.

"(b) If such transaction is by a person affiliated with a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier.

"(c) If such transaction is by two or more persons acting together, one of whom is a carrier or is affiliated with a carrier, and if the effect of such transaction is to place such persons and carriers and persons affiliated with any one of them and persons affiliated with any such affiliated carrier, taken together, in control of another carrier.

"(8) For the purposes of paragraph (7) a person shall be held to be affiliated with a carrier if, by reason of the relationship of such person to such carrier (whether by reason of the method of, or circumstances surrounding organization or operation, or whether established through common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or any other direct or indirect means), it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier.

"(9) For the purposes of paragraphs (6), (7), (8), and (11), wherever reference is made to control it is immaterial whether such control is direct or indirect. As used in this paragraph and paragraphs (7), (8), and (11) the term 'control' shall be construed to include the power to exercise control.

"(10) The Commission is hereby authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (6). If the Commission finds after such investigation that such person is violating the provisions of such paragraph, it shall by order require such person to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation.

"(11) For the proper protection and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraph (3) and the regulation of interstate commerce in accordance therewith, the Commission is hereby authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether the holding by any person of stock or other share capital of any carrier (unless acquired with the approval of the Commission) has the effect (a) of subjecting such carrier to the control of another carrier or to common control with another carrier, and (b) of preventing or hindering the carrying out of any part of such plan or of impairing the independence, one of another, of the systems provided for in such plan. If the Commission finds after such investigation that such holding has the effects described, it shall by order provide for restricting the exercise of the voting power of such person with respect to such stock or other share capital (by requiring the deposit thereof with a trustee, or by other appropriate means) to the extent necessary to prevent such holding from continuing to have such effects.

"(12) If in the course of any proceeding under this section before the Commission, or of any proceeding before a court in enforcement of an order entered by the Commission under this section, it appears that since the beginning of such proceeding the plan for consolidation has been re-

opened under paragraph (3) for changes or modifications with respect to the allocation of the properties of any carrier involved in such proceeding, then such proceeding may be suspended.

"(13) The district courts of the United States shall have jurisdiction upon the application of the Commission, alleging a violation of any of the provisions of this section or disobedience of any order issued by the Commission thereunder by any person, to issue such writs of injunction or other proper process, mandatory or otherwise, as may be necessary to restrain such person from violation of such provision or to compel obedience to such order.

"(14) The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (4), (10), or (11), as it may deem necessary or appropriate.

"(15) The carriers and any corporation affected by any order made under the foregoing provisions of this section shall be, and they are hereby, relieved from the operation of the antitrust laws as designated in section 1 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, and of all other restraints or prohibitions by or imposed under authority of law, State or Federal, insofar as may be necessary to enable them to do anything authorized or required by such order.

"(16) If any provision of the foregoing paragraphs of this section, or the application thereof to any person or circumstances, is held invalid, the other provisions of such paragraphs, and the application of such provision to any other person or circumstances, shall not be affected thereby.

"(17) As used in paragraphs (4) to (16), inclusive, the term 'person' includes an individual, partnership, association, joint-stock company, or corporation, and the term 'carrier' means a carrier by railroad subject to this Act."

SEC. 203. Such section 5 is further amended by renumbering as paragraph (18) the paragraph added by the Act entitled "An Act to amend section 407 of the Transportation Act of 1920," approved June 10, 1921, and by renumbering the remaining three paragraphs as paragraphs (19), (20), and (21), respectively.

SEC. 204. The provisions of the Interstate Commerce Act, as amended, and of all other applicable Federal statutes, as in force prior to the enactment of this title, shall remain in force, as though this title had not been enacted, with respect to the acquisition by any carrier, prior to the enactment of this title, of the control of any other carrier or carriers.

MOTOR CARRIER ACT OF 1935 (49 STAT. 543, 555)

CONSOLIDATION, MERGER, AND ACQUISITION OF CONTROL

SEC. 213. (a) It shall be lawful, under the conditions specified below, but under no other conditions, for two or more motor carriers which are not also carriers by railroad to consolidate or merge their properties, or any part thereof, into one corporation for the ownership, management, and or operation of the properties theretofore in separate ownership; or for any such motor carrier or two or more such carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another such carrier; or for any such motor carrier or two or more such carriers jointly, to acquire control of another such carrier through purchase of its stock; or for a person which is not a motor carrier or a carrier by railroad, or express, or water to acquire control of two or more motor carriers through ownership of their stock; or for any such person which has control of one or more motor carriers to acquire control of another such carrier through ownership of its stock; or for a carrier by railroad, ex-

press, or water to consolidate, or merge with, or acquire control of, any motor carrier or to purchase, lease, or contract to operate its properties, or any part thereof.

(1). Whenever a consolidation, merger, purchase, lease, operating contract, or acquisition of control is proposed under this section, the carrier or carriers or the person seeking authority therefore shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties or operations of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants, and other parties known to have a substantial interest in the proceeding of the time and place for a public hearing. If after such hearing the Commission finds that the transaction proposed will be consistent with the public interest and that the conditions of this section have been or will be fulfilled, it may enter an order approving and authorizing such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided, however,* That if a carrier other than a motor carrier is an applicant, or any person which is controlled by such a carrier other than a motor carrier or affiliated therewith within the meaning of section 5 (8) of part I, the Commission shall not enter such an order unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than a motor carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(2) Whenever a person which is not a motor carrier is authorized, by an order entered under subparagraph (1) of this section, to acquire control of any such carrier or of two or more such carriers, such person thereafter shall, to

the extent provided by the Commission, for the purposes of section 204 (a) (1), and section 220 (a) and (b), relating to accounts, records, and reports, and to the inspection of facilities and records, including the penalties applicable in the case of violations thereof, be subject to the provisions of this part.

(b) (1) It shall be unlawful for any person, except as provided in paragraph (a), to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more motor carriers which are not also carriers by railroad, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this part and in violation of this paragraph. As used in this paragraph, the words "control or management" shall be construed to include the power to exercise control or management.

(2) The Commission is hereby authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (b) (1) of this section. If the Commission finds after such investigation that such person is violating the provisions of such paragraph, it shall by order require such person to take such action consistent with the provisions of this part as may be necessary, in the opinion of the Commission, to prevent further violation of such provisions.

(3) For the purposes of this section, wherever reference is made to control, it is immaterial whether such control is direct or indirect.

(c) The district courts of the United States shall have jurisdiction upon the application of the Commission, alleging a violation of any of the provisions of this section or disobedience of any order issued by the Commission thereunder by any person, to issue such writs of injunction or other proper process, mandatory or otherwise, as may be necessary to restrain such person from violation of such provision or to compel obedience to such order.

(d) The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraphs (a) or (b), as it may deem necessary or appropriate.

(e) Except where a carrier other than a motor carrier is an applicant or any person which is controlled by such a carrier or carriers by railroad or affiliated therewith within the meaning of section 5 (8) of part I, the provisions of this section requiring authority from the Commission for consolidation, merger, purchase, lease, operating contract, or acquisition of control shall not apply where the total number of motor vehicles involved is not more than twenty.

(f) The carriers and any person affected by any order made under the foregoing provisions of this section shall be, and they are hereby, relieved from the operation of the "antitrust laws," as designated in section 1 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, and of all other restraints or prohibitions by or imposed under authority of law, State or Federal, insofar as may be necessary to enable them to do anything authorized or required by such order.

TRANSPORTATION ACT OF 1940 (54 STAT. 898, 905)

POOLING; UNIFICATIONS, MERGERS, AND ACQUISITIONS OF CONTROL

SEC. 7. Section 5 of the Interstate Commerce Act, as amended, is amended to read as follows:

"SEC. 5. (1) Except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of section 1 of this part, it shall be unlawful for any common carrier subject to this part, part II, or part III to enter into any contract, agreement, or combination with any other such common carrier or carriers for the pooling or division of traffic, or of service, or of gross or net earnings, or of any portion thereof; and in any case of an unlawful agreement for the pooling or division of traffic, service, or earnings as aforesaid each day of its continuance shall be a separate offense: *Provided*, That whenever the Commission is of opinion, after hearing upon application of any such carrier or carriers or upon its own initiative, that the pooling or division, to the extent indicated by the Commission, of their traffic, service, or gross or net earnings, or of any portion thereof, will be in the interest of better service to the public or of economy in operation, and will not unduly restrain competition, the Commission shall by order approve and authorize, if assented to by all the carriers involved, such pooling or division, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises: *Provided further*, That any contract, agreement, or combination to which any common carrier by water subject to Part III is a party, relating to the pooling or division of traffic, service, or earnings, or any portion thereof lawfully existing on the date this paragraph as amended takes effect, if

filed with the Commission within six months after such date, shall continue to be lawful except to the extent that the Commission, after hearing upon application or upon its own initiative, may find and by order declare that such contract, agreement, or combination is not in the interest of better service to the public or of economy in operation, or that it will unduly restrain competition.

"(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier and terminals incidental thereto.

"(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205 (e)), and shall

afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing, and a public hearing shall be held in all cases where carriers by railroad are involved. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

"(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

"(d) The Commission shall have authority in the case of a proposed transaction under this paragraph (2) involv-

ing a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

"(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph (2) except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph (2) which will result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to public interest.

"(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provision of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other

provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

"(3) Whenever a person which is not a carrier is authorized, by an order entered under paragraph (2), to acquire control of any carrier or of two or more carriers, such person thereafter shall, to the extent provided by the Commission in such order, be considered as a carrier subject to such of the following provisions as are applicable to any carrier involved in such acquisition of control: Section 20 (1) to (10), inclusive, of this part, sections 204 (a) (1) and (2) and 220 of part II, and section 313 of part III (which relate to reports, accounts, and so forth, of carriers), and section 20a (2) to (11), inclusive, of this part, and section 214 of part II (which relate to issues of securities and assumptions of liability of carriers), including in each case the penalties applicable in the case of violations of such provisions. In the application of such provisions of section 20a of this part and of section 214 of part II, in the case of any such person, the Commission shall authorize the issue or assumption applied for only if it finds that such issue or assumption is consistent with the proper performance of its service to the public by each carrier which is under the control of such person, that it will not impair the ability of any such carrier to perform such service, and that it is otherwise consistent with the public interest.

"(4) It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result

is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5), the words "control or management" shall be construed to include the power to exercise control or management.

"(5) For the purposes of this section, but not in anywise limiting the application of the provisions thereof, any transaction shall be deemed to accomplish or effectuate the control or management in a common interest of two carriers—

(a) if such transaction is by a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

(b) if such transaction is by a person affiliated with a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

(c) if such transaction is by two or more persons acting together, one of whom is a carrier or is affiliated with a carrier, and if the effect of such transaction is to place such persons and carriers and persons affiliated with any one of them and persons affiliated with any such affiliated carrier, taken together, in control of another carrier.

"(6) For the purposes of this section a person shall be held to be affiliated with a carrier if, by reason of the relationship of such person to such carrier (whether by reason of the method of, or circumstances surrounding organization or operation, or whether established through common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or any

other direct or indirect means), it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier.

"(7) The Commission is hereby authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (4). If the Commission finds after such investigation that such person is violating the provisions of such paragraph, it shall by order require such person to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation. The provisions of this paragraph shall be in addition to, and not in substitution for, any other enforcement provisions contained in this part; and with respect to any violation of paragraphs (2) to (12), inclusive, of this section, any penalty provision applying to such a violation by a common carrier subject to this part shall apply to such a violation by any other person.

"(8) The district courts of the United States shall have jurisdiction upon the complaint of the Commission, alleging a violation of any of the provisions of this section or disobedience of any order issued by the Commission thereunder by any person, to issue such writs of injunction or other proper process, mandatory or otherwise, as may be necessary to restrain such person from violation of such provision or to compel obedience to such order.

"(9) The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2), or (7), as it may deem necessary or appropriate.

"(10) Nothing in this section shall be construed to require the approval or authorization of the Commission in the case of a transaction within the scope of paragraph

(2) where the only parties to the transaction are motor carriers subject to part II (but not including a motor carrier controlled by or affiliated with a carrier as defined in section 1 (3) and where the aggregate number of motor vehicles owned, leased, controlled, or operated by such parties, for purposes of transportation subject to part II, does not exceed twenty.

(11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transactions so approved or provided for in accordance with the terms and conditions, if any imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or

franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to, and in modification of its power under its corporate charter or under the laws of any State.

"(12) If any provision of the foregoing paragraphs of this section, or the application thereof to any person or circumstances, is held invalid, the other provisions of such paragraphs, and the application of such provision to any other person or circumstances, shall not be affected thereby.

"(13) As used in paragraphs (2) to (12), inclusive, the term 'carrier' means a carrier by railroad and an express company, subject to this part; a motor carrier subject to part II; and a water carrier subject to part III.

"(14) Notwithstanding the provisions of paragraph (2), from and after the 1st day of July 1914, it shall be unlawful for any carrier as defined in section 1 (3), or (after the date of the enactment of this amendatory section) any person controlling, controlled by, or under common control with, such a carrier to own, lease, operate, control, or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier by water operated through the Panama Canal or elsewhere with which such carrier aforesaid does or may compete for traffic or any vessel carrying freight or passengers upon said water route or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic; and in case of the violation of this provision each day in which such violation continues shall be deemed a separate offense.

"(15) Jurisdiction is hereby conferred on the Commission to determine questions of fact, arising under para-

graph (14), as to the competition or possibility of competition, after full hearing, on the application of any railroad company or other carrier. Such application may be filed for the purpose of determining whether any existing service is in violation of such paragraph and may pray for an order permitting the continuance of any vessel or vessels already in operation, or may pray for an order under the provisions of paragraph (16). The Commission may on its own motion or the application of any shipper institute proceedings to inquire into the operation of any vessel in use by any railroad or other carrier which has not applied to the Commission and had the question of competition or the possibility of competition determined as herein provided. In all such cases the order of said Commission shall be final.

"(16) Notwithstanding the provisions of paragraph (14), the Commission shall have authority, upon application of any carrier, as defined in section 1 (3), and after hearing, by order to authorize such carrier to own or acquire ownership of, to lease or operate, to have or acquire control of, or to have or acquire an interest in, a common carrier by water or vessel, not operated through the Panama Canal, with which the applicant does or may compete for traffic, if the Commission shall find that the continuance or acquisition of such ownership, lease, operation, control, or interest will not prevent such common carrier by water or vessel from being operated in the interest of the public and with advantage to the convenience and commerce of the people, and that it will not exclude, prevent, or reduce competition on the route by water under consideration: *Provided*, That if the transaction or interest sought to be entered into, continued, or acquired is within the scope of paragraph (2) (a), the provisions of paragraph (2) shall be applicable thereto in addition to the

provisions of this paragraph: *And provided further*, That no such authorization shall be necessary if the carrier having the ownership, lease, operation, control, or interest has, prior to the date this section as amended becomes effective, obtained an order of extension under the provisions of paragraph (21) of this section, as in effect prior to such date, and such order is still in effect."